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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 226

THE DREDGE CORPORATION, a Nevada corporation,
Petitioner,

vs.

HUSITE COMPANY, a Nevada corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

Brief for Respondent in Opposition

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JURISDICTION

The jurisdiction of this Court is acknowledged.

STATUTES, FEDERAL RULES AND REGULATIONS INVOLVED

The Taylor Grazing Act, 43 U. S. C., Ch. 8A, § 315g and § 315c; pertinent portions of the *Land Management Manual, Vol. 5, Lands, Chap. 1.12, Requests for Reports and Chapter 2.15, Private Exchanges-Taylor Act.*

QUESTIONS PRESENTED

The form of presentation of the questions is accepted by Respondent. Those portions argumentative in nature will be subsequently referred to.

STATEMENT

Petitioner's statement sets forth a chronological analysis of the occurrences before the lower Courts. Authorities are inserted therein in behalf of Petitioner's position and which will be distinguished by Respondent in that portion of this brief designated "*Argument.*"

ARGUMENT

Reference will be first made to the cases cited by Petitioner and to their disposition. First cited is that of *Emil L. Krushnic v. U. S.*, 280 U.S. 305, 74 L. Ed. 445, as the authority for its claim of property right. At page 15 in the opinion of the Nevada Supreme Court reference is made to this case as *Wilbur v. United States*, 280 U.S. 306, 50 S. Ct. 103, 74 L. Ed. 445. Nothing could be more clear than the consideration given this authority by the Nevada Supreme Court, together with that Court's reasons why this citation, while a good statement of law, was not applicable to this case.

As authority for the requirement of a hearing, Petitioner cites *United States v. Keith V. O'Leary et al*, A-27260, 63 I. D. p. 341. Further reference is made to this citation as follows. This case does, in effect, in quoting from *Cameron v. United States*, 252 U.S. 450, 460, 461, state that:

> "Due process in such a case implies notice and a hearing. But this does not require that the hearing must be in the courts, or forbid an inquiry and determination by the Land Department."

The case does make the exception, in quoting from *U. S. v. Tucker Truck Lines*, 344 U.S. 33, which case involved an application for a permit under the ICC. The court there holds that the objection that the hearing examiner was not appointed in conformity with the provisions of the Administrative Procedure Act cannot be raised after the examining officer has made his findings. In that Supreme Court case the objection to the method of appointment of the examiner of the ICC was raised before the commission at the hearing, but after the examiner had issued the permit. The court held that this is improper and not timely. The court said that there must be an opportunity for correction before it is reviewable by the courts.

In a footnote to the case, the court pointed out that the government informed the court that in about 5,000 cases commenced after the date of the Administrative Procedure Act, orders are for an indefinite period vulnerable to attack if no timely objection during the administrative process is required. The policy of the commission is to grant application for rehearing in cases where applicant made the objection before the examiner, Since the established practice is not to consider issues not raised before the examiner, it will refuse hearings in other cases. The Supreme Court went on to say:

> "Simple fairness to those who are engaged in the task of administration and to litigants requires the general rule the court should not topple over administrative decisions unless the administrative body not only has erred, but has erred against objection made at the time appropriate under this practice."

Petitioner, in support of its contention that the Department of the Interior has deprived Dredge of its property in violation of the Constitution of the United States, refers

to Appendix, Page 24, being the Nevada Supreme Court Opinion, as follows:

> "That this contention is without merit is evident from the undisputed facts. Dredge does not even assert that it was ever on or ever claimed or ever heard of any part of this land for over two years after Husite filed its exchange application. Upon the filing of such application the Bureau of Land Management published notice that any adverse claimants should file their claims or objections with the Bureau. Dredge had notice and knowledge of the filing of the exchange application but filed no claims to any part of the land or any objections to the granting of Husite's application. As the application antedated by over two years any connection that Dredge may have had with this land or the title thereto, it is inconceivable that action thereon by the Department of the Interior could have violated any constitutional rights or any parts of the Administrative Procedure Act with reference to the nonexistent claims of Dredge."

Petitioner then attempts to negate this holding by the mere statement that Petitioner had recorded its mining locations prior to *published* notice by Respondent. This statement is true, but not contrary to or in conflict with the statement and reasoning of the Supreme Court of the State of Nevada.

Noyes v. Mantle, 127 U.S. 348, 32 L. Ed. 168, 8 S. Ct. Rep. 1132-1; *Montgomery v. Gerlinger*, 146 Cal. App. 2d 650, 304 P.2d 93; and *St. Louis Mining and Milling Co. v. Montgomery Mining Co.*, 171 U.S. 650, 655, 43 L. Ed. 320, 322, 19 S. Ct. Rep. 61 and 63 are next referred to by Petitioner. Petitioner refers to the decision of the Supreme Court of the State of Nevada and particularly to page 20 thereof wherein that Court considered the cases and distinguished them as follows:

"The Supreme Court of the State of Nevada then concluded that the cases cited did not apply since proof of a valid mining claim did not exist in the pleadings of Dredge.

The Supreme Court of Nevada in its opinion states (Appendix, p. 20):

> "We have heretofore cited in some detail Dredge's more definite statement filed in response to Husite's demand. Yet it refrained from any allegation or assertion that it had ever made a discovery of mineral, to any extent whatsoever, that it ever erected a monument, drove a stake, or posted a notice, restricting itself to any unsworn statement signed by its attorneys that it had recorded *location notices*, whose dates showed that the "asserted locations" had been made over two years after the filing of Husite's exchange application.'"

Petitioner has raised five questions which are accepted by Respondent as to form. The first of these questions has to do with 43 U. S. C. § 315c, which recites as follows:

> "*Rights of way; development of mineral resources* Nothing contained in this chapter shall restrict the acquisition, granting or use of permits or rights-of-way within grazing districts under existing laws; or ingress or egress over the public lands in such districts for all proper and lawful purposes; and nothing contained in this chapter shall restrict prospecting, locating, developing, mining, entering, leasing, or patenting the mineral resources of such districts under law applicable thereto. (June 28, 1934, C. 865, § 6, 48 Stat. 1272.)"

There can be no argument with this provision of the Taylor Grazing Act in that it reserves to the public the rights to go upon federally held land under this provision. If there were no patent applied for on the land in question,

or if this were the land received in exchange by the U. S. Government, no question would be raised at all. Actually, Petitioner's question number 3 must be taken in conjunction with question number 1. If Petitioner's reasoning were followed, a person may go upon lands upon which a patent application is pending two years after the application has been filed, and by recording notices of location, obtain an immediately absolute right against the applicant, even though such person chooses not to appear and notify the Bureau of Land Management of these claims. It is difficult to see how Petitioner herein can maintain a denial of due process of the refusal of a right to be heard when the Petitioner had actual and constructive notice of Respondent's application and refused to avail itself of the forum provided. In the case of *James R. Crawford*, 53 I.D. 435, 438, such a problem was met and referred to in the Nevada Supreme Court opinion at page 26, paragraph (9), with footnote, as follows:

> "(9) In view of our conclusion that the summary judgment in favor of Husite must be affirmed by reason of the entire absence in the record of any showing that the Dredge Corporation was the owner of valid mining claims on the property, we have not found it necessary to determine on this appeal whether or not Dredge was estopped from asserting the claims by reason of its failure to object to the granting of Husite's exchange application after notice and knowledge of Husite's application.[1]
>
> No case has been cited from any court holding that a mining claimant is likewise estopped by failure to object to an exchange application. The commissioner of the General Land Office in James R. Crawford, 53 I.D.

1. In mining patent conflicts such failure to protest or object estops the claimant from later asserting his claims. 30 U.S.C.A. Secs. 29, 30.

435, 438, had held in the case of a conflict of mining claimants with a school land indemnity list: "'Moreover, it is as incumbent upon mineral claimants to keep advised of non-mineral applications pending in the General Land Office as it is to keep advised of mineral applications against which it would be necessary to file an adverse claim.'" The Secretary affirmed on the ground of the conclusiveness of the approval of the school land indemnity list and on the ground that there was no clear, unequivocal, and convincing evidence of fraud, nor that the approval of the list was the result of any error, mistake, or inadvertence in the Land Department. The Secretary stated however that the department was not in agreement with the commissioner's holding that the failure to protest was "attended with the same fatality to his possessory right as would follow from his failure to adverse a hostile mineral application. * * *" Crawford's motion for rehearing before the Secretary was denied. 53 I.D. 435, 439."

Question number 4 desires an answer as to whether or not an application for exchange under the Taylor Grazing Act segregates the land from appropriation under mining laws. More in point would be whether or not the application of Respondent and all attendant circumstances segregates the land insofar as Petitioner was concerned under those same circumstances. We again respectfully draw the Court's attention to the reasoning of the Nevada Supreme Court, at page 26, Nevada Supreme Court opinion, and footnote 1 contained therein.

Petitioner's question number 5 again reiterates Petitioner's allegation that the validity of the mining claim was placed at issue and that there had been no administrative proceeding to determine its validity. Therefore, there could have been no summary judgment. At page 16 of the Petition herein, Petitioner states as follows:

> "There can be no question that had petitioner filed a protest during the pendency of Husite's application for exchange that a hearing would have taken place and petitioner would have been afforded due process."

We are in complete accord with Petitioner's statement in this regard, and that, taken together with the *Crawford* case and the failure to set forth material facts placing the validity of the alleged claims in issue before the lower Court, disposes of this question.

At this time, mention should be made of the conclusiveness of the patent when issued and further, the conclusive presumption that all antecedent procedural steps have been followed.

> "A patent is conclusive evidence that all antecedent steps necessary to its issuance have been properly and legally taken."
>
> *Round Mountain Mining Co. v. Round Mountain Sphinx Mining Co.*, 36 Nev. 543, 138 P. 71.

Reference to the rule as cited under this heading are to *Bureau of Land Management Manual, Volume V., Lands, Chapter 1.12, Requests for Reports and Chapter 2.15, Private Exchanges—Taylor Act.*

The manual states that private exchanges are transactions whereby the United States acquired title to private lands in exchange for public lands pursuant to authority granted by the Taylor Grazing Act. (Chap. 2.15.1) and that either party to a private exchange may reserve the minerals. (Chap. 2.15.6)

These rules provide that when application for exchange is filed, the Adjudication Officer of the Bureau shall examine it (Chap. 2.15.9) and request a report from the Geological Survey. (Chaps. 2.15.10, 1.12.1) These rules also

require that in this report the Geological Survey must state that the selected lands are either (a) valuable for specified minerals, or (b) are not valuable for minerals, or (c) may be valuable for minerals. In the latter case, the Geological Survey must recommend investigation by the Bureau of Land Management. (Chap. 1.12.3) The case record is then referred by the Adjudication Officer to the Land Classification Officer (Chap. 2.15.11) who undertakes the necessary investigation and then reports to the Adjudication Officer, among other things, "The mineral character of the lands, including information as to any mining claims known to be of record or observed upon the land." (Chap. 2.15.19) The Adjudication Officer in examining the application must determine that "the proposed mineral reservations conform to the policy of the Department". (Chap. 2.15.9J) and if not, the application is rejected "unless the Land Classification Officer finds that the public interest might be seriously injured thereby." (Chap. 2.12.12G (1)) "If disposal of all conflicts is favorable to the applicant and the selected land is and should be available to (the applicant) the Adjudication Officer will issue a decision:

A. Authorizing publication.

B. Listing all reservations included in the patent." (Chap. 2.15.15)

After receipt of proof of publication, the Adjudication Officer is required to have:

"A. Protest and appeals, if any, processed to completion." (Chap. 2.15.16A)

If all is regular, the decision issues accepting the offered lands, approving the selected lands for patenting and listing all reservations to be included in the patent. (Chap. 2.15.16C).

Petitioner herein has raised these questions before the trial court, the Supreme Court of the State of Nevada, and now seeks review from this Court. In the face of admissions found in the chronological order of events, which indicate its first entrance upon the property two years after Respondent filed the application for exchange an opportunity to be heard and lack of utilization of that opportunity and a further delay from the time that the patent was granted to Respondent in 1953 until an action for quiet title was brought in 1959. In attempting to explain these circumstances, Petitioner, in essence, maintains that it is not required to appear in answer to notice by reason of the phraseology of *43 U.S.C. § 315r*, which we submit is not in conflict with the provisions of *43 U.S.C. § 315q*, and not applicable.

The admissions of Petitioner, together with the Bureau of Land Management Manual, the conclusiveness of the determination when patent is granted as set forth in *Round Mountain Mining Co. v. Round Mountain Sphinx Mining Co.*, and the rights of a pending patent applicant as found in the *Crawford* case, successfully answers the questions propounded by Petitioner.

CONCLUSION

For the foregoing reasons, the Petition for the Writ of Certiorari should be denied.

Respectfully submitted,

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